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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6316

ANDREW C. GOOSBY, *et al.*,

Petitioners,

VS.

MAURICE OSSER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND NATIONAL OFFICE FOR THE RIGHTS OF THE INDIGENT AS *AMICI CURIAE*

Statement of Interest of the *Amici Curiae*

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation formed under the laws of the State of New York in 1939. The Fund was incorporated to assist black people to secure their constitutional rights by the prosecution of lawsuits. Under its charter, one of its purposes is to provide free legal assistance to Negroes

who suffer injustice because of race and who are unable, on account of poverty, to employ legal counsel.[1]

A central purpose of the Fund is the legal eradiction of practices in our society that bear with discriminatory harshness upon black people and upon the poor, deprived and friendless, who too often are black. To further this purpose, the Fund in 1967 established a separate corporation, the National Office for the Rights of the Indigent (N.O.R.I.), having among its objectives the provision of legal representation to the poor in individual cases and the advocacy before appellate courts of changes in legal doctrine which unjustly affect the poor. E.g., *Williams* v. *Illinois*, 399 U.S. 235 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

In 1970, the Fund commenced a national program for the purpose of promoting efforts toward prison reform. Its objectives include research to identify the most serious and fundamental problems in corrections, and test litigation or suggestion of administrative or legislative reform when appropriate.[2]

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[1] The Fund's charter was approved by a New York Court, authoring the organization to serve as a legal aid society. It is entirely independent of other organizations, and is supported by contributions from the public.

[2] See generally, *Cruz* v. *Beto*, 405 U.S. 319 (1972); *Haines* v. *Kerner*, 404 U.S. 519 (1972); *Younger* v. *Gilmore*, 404 U.S. 15 (1971) (amicus); *Gray* v. *Creamer*, —— F.2d ——, No. 71-1714 (3rd Cir. Aug. 14, 1972); *Mead* v. *Parker*, —— F.2d ——, No. 71-2462 (9th Cir. July 20, 1972); *Wilkinson* v. *Skinner*, —— F.2d ——, 11 Cr.L. Rptr. 2417 (2nd Cir. June 28, 1972); *Goodwin* v. *Oswald*, —— F.2d ——, 11 Cr.L. Rptr. 2360 (2nd Cir. June 19, 1972) (amicus); *Wright* v. *McMann*, 460 F.2d 126 (2nd Cir. 1972); *Jones* v. *Rouse*, 457 F.2d 1318 (5th Cir. 1972); *Rodriquez* v. *McGinnis*, 456 F.2d 79 (2nd Cir. 1972) (en banc), cert. granted, —— U.S. —— (June 19, 1972); *Smith* v. *Robbins*, 454 F.2d 696 (1st Cir. 1972) (amicus); *Novak* v. *Beto*, 453 F.2d 661, reh. en banc denied, 456 F.2d 1303 (5th Cir. 1972), pet. cert. filed sub nom. *Sellars* v. *Beto*, No. 71-6789 O.T. 1971; *Inmates of Attica Correc-*

Recognizing also the discriminatory features of the American bail system,[3] and the fact that actual conditions of pretrial detention throughout the country,[4] 1) are inconsistent with the presumptively innocent status of awaiting trial prisoners, 2) threaten to adversely affect the fundamental right to a fair trial,[5] and 3) frequently bear little relationship to the State's legitimate interest of insuring the presence of the accused at trial,[6] LDF has developed

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tional Facility v. *Rockefeller*, 453 F.2d 12 (2nd Cir. 1971); *Nolan* v. *Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971); *United States ex rel. Kendzierski* v. *Brantley*, 447 F.2d 806 (7th Cir. 1971); *Holt* v. *Sarver*, 442 F.2d 304 (8th Cir. 1971); *Sostre* v. *McGinnis*, 442 F.2d 178 (2nd Cir. 1971) (amicus); *Jackson* v. *Godwin*, 400 F.2d 529 (5th Cir. 1968); *Inmates of the Boys' Training School* v. *Affleck*, —— F. Supp. ——, No. 4529 (D.R.I. July 28, 1972); *Nat'l Prisoners' Reform Ass'n* v. *Sharkey*, —— F. Supp. ——, No. 4884 (D.R.I. May 9, 1972); *Chicago Connections* v. *Bensinger*, No. 71C 2382 (N.D. Ill. Mar. 30, 1972); *Little* v. *Cherry*, No. LR-71-C-89 (E.D. Ark. Dec. 30, 1971); *Sostre* v. *Otis*, 330 F. Supp. 941 (S.D. N.Y. 1971); *Clutchette* v. *Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971); *Bundy* v. *Cannon*, 328 F. Supp. 165 (D. Md. 1971); *Fortune Society* v. *McGinnis*, 319 F. Supp. 901 (S.D. N.Y. 1970); *Carothers* v. *Follette*, 314 F. Supp. 1014 (S.D. N.Y. 1970); *Morris* v. *Travisono*, 310 F. Supp. 857 (D.R.J. 1970).

The issues presented in the above cases cover a broad spectrum of the difficulties faced by prisoners in realizing their fundamental rights as American citizens.

[3] See, Foote, *The Coming Constitutional Crisis In Bail: II*, 113 U. Pa. L. Rev. 1125 (1965). *In Schilb* v. *Kuebel*, 404 U.S. 357, 372 (1971), this Court upheld an Illinois law which "brought reform and needed relief to the State's bail system."

[4] E.g., Mattick & Aikman, *The Cloacal Region of American Corrections*, 381 Annals of the American Academy of Political and Social Sciences 109 (1969); McGee, *The Administration of Justice: The Correctional Process*, 5 N.P.P.A.J. 225 (1959); 1970 Nat'l Jail Census (Sup. Doc., U.S. Gov't Printing Off., Wash., D.C.).

[5] Rankin, *The Effect of Pre-trial Detention*, 39 N.Y.U.L. Rev. 641 (1964).

[6] Note, *Constitutional Limitations on the Conditions of Pre-trial Detention*, 79 Yale L.J. 941 (1970); Note, *Incarcerating The Innocent: Pre-trial Detention In Our Nation's Jails*, 21 Buf. L. Rev. 891 (Spring 1972).

and participated in substantial nationwide litigation on behalf of pretrial detainees, beginning with the case of *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802 (1969).[7]

As will be discussed further below, the lower federal courts in the past few years have consistently applied the fundamental constitutional principles of due process of law so as to protect the rights of accused persons, incarcerated while awaiting trial, not to be subjected to measures that are, in reality, punitive, and which bear no reasonable relationship to the central purpose of pretrial detention: assuring presence of the defendant at trial. The decisions of the courts below in *Goosby* v. *Osser* appear to sanction the loss of a citizen's most precious and basic right, the vote, without requiring a strong showing by the State that such disenfranchisement is either necessary or the least restrictive means of serving some legitimate State interest. For this reason, we respectfully present our views on the issue before the Court. The parties have consented to the filing of a brief by amici, and copies of their letters of consent are being submitted to the Clerk with this Brief.

Issue Presented

1. Whether a substantial constitutional question, sufficient to warrant the convening of a three-judge District

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[7] See generally, *Jones* v. *Wittenberg,* 323 F. Supp. 93, 330 F. Supp. 707 (N.D. Ohio 1971), aff'd sub nom. *Jones* v. *Metzger,* 456 F.2d 854 (6th Cir. 1972); *Hamilton* v. *Love,* 328 F. Supp. 1182 (E.D. Ark. 1971); *Seale* v. *Manson,* 326 F. Supp. 1375 (D. Conn. 1971); *Davis* v. *Lindsay,* 321 F. Supp. 1134 (S.D.N.Y. 1970); *Palmigiano* v. *Travisono,* 317 F. Supp. 776 (D.R.I. 1970); *Inmates of the Milwaukee Jail* v. *Petersen,* 51 F.R.D. 540 (E.D. Wis. 1971); *Taylor* v. *Sterrett,* —— F. Supp. ——, Civ. Action No. 3-5220-B (N.D. Tex. June 5, 1972); *Collins* v. *Schoonfield,* —— F. Supp. ——, Civil No. 71-500-K (D. Md. May 15, 1972); *Inmates of the Cook County Jail* v. *Tierney,* No. 68C 504 (N.D. Ill. Aug. 22, 1968).

Court, is presented by a complaint alleging that pretrial detainees in Philadelphia are absolutely denied their fundamental right to register and vote, by virtue of the combination of a state law, which specifically precludes absentee ballots, and administrative practices and policies, which foreclose alternative methods of voting by unconvicted prisoners, which denial has not been shown, by the state, to be reasonably or necessarily related to its only legitimate interest of guaranteeing the presence of accused persons at trial.

ARGUMENT

A Substantial Constitutional Question, Sufficient To Warrant the Convening of a Three-Judge District Court, Is Presented by a Complaint Alleging the Denial by Pennsylvania of the Fundamental Right of Unconvicted Prisoners To Vote, Which Denial Has Not Been Shown, by the State, To Be Reasonably or Necessarily Related To Its Only Legitimate Interest of Guaranteeing the Presence of Accused Persons At Trial.

Although the merits of petitioner's constitutional claims need not be decided at this point, the discussion below will demonstrate the substantiality of the question presented.

It is now established, as a matter of rudimentary due process, that a person may not constitutionally be punished without trial, or before his or her guilt is proven beyond a reasonable doubt. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963); *In Re Winship*, 397 U.S. 358 (1970). This Court, in *Stack* v. *Boyle*, 342 U.S. 1 (1951), took note of the important role which bail, or pretrial release, plays in preserving the fundamental presumption of innocence.

It may be that the State's legitimate interest of insuring the presence of accused persons at trial could justify the

detention of some persons while awaiting trial. It does not follow, however, that such incarceration of unconvicted persons authorizes the extent of oppressive institutional treatment that exists in most local jails. As Blackstone appropriately observed:

> "This imprisonment, as has been said, is only for safe custody, and not for punishment; therefore in this dubious interval between commitment and trial, a prisoner ought to be used with utmost humanity; and neither loaded with needless fetters, nor subjected to other hardships than such are requisite for the purpose of confinement only."

4 Blackstone, Commentaries 300 (1765).

And Circuit Judge Freedman, sitting as a District Judge, in *Butler* v. *Crumlish*, 229 F. Supp. 565, 567 (E.D. Pa. 1964), stated:

> "The constitutional authority for the State to distinguish between criminal defendants by freeing those who supply bail pending trial and confining those who do not, furnishes no justification for any additional inequality of treatment beyond that which is inherent in the confinement itself."

In accordance with these basic principles, numerous courts around the country have granted relief to pretrial detainees who complained of unconstitutionally inhumane[1]

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[1] Barbaric and decrepit conditions of penal confinement have been cited as one of the causes of prison insurrections—the ultimate tactical resource available to inmates who want to force change. See, *The Black Hole of Manhattan*, Time Magazine, Aug. 24, 1970, at 28-29; *Revolt of the Powerless*, 5 Newsletter of the Correctional Association of N. Y. (No. 3, June 1971). Respect for the law might be enhanced if pretrial detainees were treated in a non-punitive manner, in accord with their legal presumption of innocence.

and punitive jail conditions. In such cases, the courts determined, on the basis of the record, that the challenged restrictions were not inherent in the concept of pretrial detention, and were not reasonably or necessarily related to the State's only legitimate interest—guaranteeing the presence of accused persons at trial.[9]

It cannot be lightly assumed, without evidence,[10] that effective disenfranchisement of unconvicted prisoners is actually necessary for the maintenance of pretrial detention in Philadelphia. Indeed, it appears that the frequently used and simplified procedure of registering and voting by absentee ballots would not cause any substantial interference with the operation of the jails in Philadelphia. In any event, it would seem incumbent upon the District Court to hear testimony, and make specific findings of fact, on this critical point. Accordingly, the case should be remanded to the trial court for further proceedings in this clearly justiciable matter.

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[9] See, *Anderson* v. *Nosser*, 456 F.2d 835 (5th Cir. 1972) (en banc); *Moore* v. *Ciccone*, 459 F.2d 574 (8th Cir. 1972); *United States ex rel. Jones* v. *Rundle*, 453 F.2d 147 (3rd Cir. 1971); *Conklin* v. *Hancock*, 334 F. Supp. 1119 (D.N.H. 1971); *Tyler* v. *Ciccone*, 299 F. Supp. 685 (W.D. Mo. 1969); *Payne* v. *Whitmore*, 325 F. Supp. 1191 (N.D. Cal. 1971); *Brenneman* v. *Madigan*, —— F. Supp. ——, 11 Cr.L.Rptr. 2248 (N.D. Cal. May 12, 1972); *Jackson* v. *Hendrick*, No. 71-2437 (C.P. Phil. Pa. Apr. 7, 1972); *Wayne County Jail Inmates* v. *Wayne County Bd. Comm'rs*, No. 173217 (Cir. Ct. Wayne Cty., Mich. May 18, 1971); *In Re Cisson* (N.J.Super. Ct., Som. Cty. Mar. 24, 1972); and cases cited in n. 7, infra.

[10] The Partial Transcript of proceedings in the District Court on October 6, 1971 shows that an offer of testimony was made relative to possible administrative burden on the Registration Commission and on the prison system, but that it was rejected as unnecessary because of the Court's disposition of the case on grounds of justiciability.

CONCLUSION

The reasoning of various courts which have granted relief from unconstitutional conditions of pretrial detention, bearing no reasonable or necessary relationship to the State's interest of insuring the presence of accused persons at trial, is in accord with this Court's fundamental pronouncements on the presumption of innocence before trial, and warrants Supreme Court approval. The judgments of the courts below appear to be in conflict with those principles, and they should therefore be reversed, and the case remanded to the District Court.

Respectfully submitted,

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